



Sanchez Graells, A. (2018). A duty to 'save' seemingly non-compliant tenders for public contracts?. Comments on Art 72 of the 2017 Portuguese Code of Public Contracts. *Revista de Direito Administrativo*, 59-68.
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3145088

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A duty to 'save' seemingly non-compliant tenders for public contracts? *Comments on Art 72 of the 2017 Portuguese Code of Public Contracts*

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Abstract

This paper provides a critical assessment of the rules regarding the clarification, supplementation and correction of tenders in procedures for the award of public contracts regulated by the EU 2014 Public Procurement Package. It does so through a detailed assessment of the transposition of Article 56(3) of Directive 2014/24/EU by means of the post-2017 reform version of Article 72 of the Portuguese Code of Public Contracts. The paper concentrates on four main issues: the existence of a mere discretionary power or a positive duty to seek clarifications, corrections or supplementations of tenders and their accompanying documentation; the constraints imposed on such power or duty; the desirability of unilateral tender corrections by the contracting authority; and the transparency given to the correction, supplementation or clarification of tenders. The paper assesses each of these issues against the backdrop of the existing case law of the Court of Justice of the European Union, as well as with a functional approach to the operationalisation of the Portuguese rules on correction, supplementation and clarification of tenders for public contracts.

Keywords

Public procurement, tenders, clarifications, corrections, documentation supplementation, clerical errors, non-compliant tenders, discretion, competition, equal treatment.

JEL Codes

H57, K23, K40.

1. Introduction

In the course of public procurement procedures, contracting authorities are often confronted with the practical problem of how to treat tenders¹ that fail to meet all formal and substantive requirements included in the tender documentation and, consequently, are seemingly non-compliant.² Sometimes the apparent non-compliance will result from an obvious

clerical,³ or arithmetical error.⁴ In other occasions, non-compliance may ensue from incompleteness of the documentation underpinning the content of the tender,⁵ or from lack of clarity in some of its aspects.⁶ It is also possible that the apparent non-

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¹ In this paper, 'tender' is used in a loose manner, usually including both tenders *stricto sensu* as well as applications or expressions of interest in multi-stage procedures (such as restricted procedures).

² Generally, on the acceptance of tenders non-compliant with substantive requirements or procedural formalities, see S Arrowsmith, *The Law of Public and Utilities Procurement. Regulation in the EU and the UK*, vol 1, 3rd edn (London, Sweet and Maxwell, 2014) 819-834. For discussion, mainly by reference to the Judgment of 29 March 2012 in *SAG ELV Slovensko and Others*, C-599/10, EU:C:2012:191, see A Sanchez-Graells, 'Rejection of abnormally low and non-compliant tenders in EU public procurement:

A comparative view on selected jurisdictions', in M Comba & S Treumer (eds), *Award of Contracts in EU Procurements*, vol 5 European Procurement Law Series (Copenhagen, DJØF Publishing, 2013) 273, 287-295. Available at <https://ssrn.com/abstract=2248590>, last accessed 17 March 2018.

³ Eg the omission of a unit price in one of the schedules of the tender, which is however reflected in a different part of the tender; see Judgment of the General Court of 10 December 2009, *Antwerpse Bouwwerken v Commission*, T-195/08, EU:T:2009:491. The case law also offers some rather curious examples of clerical mistakes; eg whether the use of e-mail or mail (and other modes of communication) form part of the offer; see Judgment of the General Court of 12 December 2012, *Evropaiki Dynamiki v EFSA*, T-457/07, EU:T:2012:671, paragraph 240. Or eg the incorrect reference to the relevant number of official languages of the EU; see Judgment of the General Court of 9 September 2010, *Evropaiki Dynamiki v Commission*, T-300/07, EU:T:2010:372.

⁴ Whether arithmetical errors are obvious requires careful assessment. See eg Judgment of the Court of First Instance of 21 May 2008, *Belfass v Council*, T-495/04, EU:T:2008:160.

⁵ Judgment of 10 October 2013, *Manova*, C-336/12, EU:C:2013:647. Judgment of 6 November 2014, *Cartiera dell'Adda*, C-42/13, EU:C:2014:2345.

⁶ For example, as to the preference for the award of some lots over others; see Judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraphs 68-69.

compliance or the relevant correction is linked to the requirement to submit samples for the assessment of the future supplies.⁷ Of course, in practice, there can be almost endless aspects of a tender that are unclear, incomplete or incorrect—leading to a panoply of factual circumstances resulting in different degrees of non-compliance. The discussion on seemingly non-compliant tenders in this paper is generally concerned with relatively minor shortcomings, and mostly of a procedural or formal nature. In these cases, the contracting authority may be willing to waive the relevant requirements or seek ways to correct, supplement or clarify the tenders to avoid their rejection.

Where the contracting authority has explicitly established in the tender documentation that the relevant shortcoming will result in the rejection of the non-compliant tender,⁸ no waiver is possible and the contracting authority is bound to automatically reject the tender without carrying out any additional assessment.⁹ In the absence of such explicit constraint, however, in situations involving this type of shortcomings in the received tenders, contracting authorities wishing to retain (*ie* ‘save’) a seemingly non-compliant tender may need to request additional information or documentation, and/or seek clarification of the content of the tender.¹⁰ However, the exercise of such discretion

to save seemingly non-compliant tenders cannot be unrestricted. It needs to be subject to constraints to avoid situations where the contracting authority and/or the tenderer take the opportunity of engaging in corrections, supplementations or clarifications to alter the content of the initial tender.¹¹

At EU level, before the adoption of the 2014 Public Procurement Package,¹² the practical difficulties attached to the treatment of seemingly non-compliant tenders were solely addressed in a limited number of CJEU Judgments that operationalised the requirements and constraints derived from the general principles of EU public procurement law. As a result of the recent reform of EU public procurement rules and in an attempt to recast that case law,¹³ the possibility of seeking correction, supplementation or clarification of seemingly non-compliant tenders has been subjected to explicit regulation in Article 56(3) of Directive 2014/24/EU,¹⁴ according to which

Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous or where specific documents are missing, contracting authorities may, unless otherwise provided by the national law implementing this Directive, request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency.

This provision therefore solely clarifies the existence of the possibility to seek correction, supplementation or clarification of seemingly non-compliant tenders. However, it defers the setting of more detailed rules to the general principles of EU public procurement law (and their interpreting case law, which continues to grow¹⁵) and to the domestic

⁷ Judgment of 11 May 2017, *Archus and Gama*, C-131/16, EU:C:2017:358.

⁸ Judgment of 28 February 2018, *MA.T.I. SUD*, C-523/16, EU:C:2018:135, paragraph 49; Judgment of 10 November 2016, *Ciclat*, C-199/15, EU:C:2016:853, paragraph 30.

⁹ On the desirability of mitigating the harshness of this rule through the principle of proportionality, see S Treumer, ‘Award of contracts covered by the EU public procurement rules in Denmark’, in Comba & Treumer (eds), *Award of Contracts in EU Procurements* (n 2) 39, 62. However, it is worth noting that the same restriction applies where the tender documentation has specified automatic exclusion grounds and, consequently, the contracting authority is under a duty to exclude the economic operator, without the possibility of having recourse to a moderating proportionality analysis. See Judgment of 14 December 2016, *Connexion Taxi Services*, C-171/15, EU:C:2016:948.

¹⁰ The extent to which this is strictly discretionary or contracting authorities are at least partially obliged to seek clarifications and attempt to ‘save’ seemingly non-compliant tenders can be debated; see C Risvig Hamer, ‘Requesting additional information – increase of flexibility and competition?’, in GS Ølykke & A Sanchez-Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules* (Cheltenham, Edward Elgar, 2016) 235, 244–247. As argued elsewhere, I think that there are good reasons to conceptualise this as a limited duty to seek clarifications embedded in the more general duty of good administration; Sanchez-Graells (n 2) 289–293.

¹¹ *Eg* by changing the liability rules in the contract; see Judgment of the General Court of 29 October 2015, *Vanbreda Risk & Benefits v Commission*, T-199/14, EU:T:2015:820. Or by seeking to rely on the capacities of third parties not initially included in the tender; see Judgment of 4 May 2017, *Esaprojekt*, C-387/14, EU:C:2017:338.

¹² That is, Directive 2014/23/EU, Directive 2014/24/EU and Directive 2014/25/EU.

¹³ For in-depth discussion, see Risvig Hamer (n 10) *in totum*.

¹⁴ [2014] OJ L 94/65. An identical provision exists in the regime applicable to utilities procurement; see Art 76(4) of Directive 2014/24/25 [2014] OJ L 94/243.

¹⁵ Indeed, after the adoption of Directive 2014/24/EU, the CJEU has issued important Judgments in this area, including *Cartiera dell’Adda*, EU:C:2014:2345; *Partner Apelski Dariusz*, EU:C:2016:214; *Ciclat*, EU:C:2016:853; *Esaprojekt*, EU:C:2017:338; *Archus and Gama*, EU:C:2017:358; or *MA.T.I. SUD*, EU:C:2018:135.

transposition of the Directive. In that regard, and given the peculiarities detailed below, it is interesting to assess the transposition in Portugal—which raises some interesting questions of compatibility with EU law, as well as some tricky challenges for its practical application.

It is worth noting that Portugal transposed the 2014 Public Procurement Package through Decree-Law 111-B/2017,¹⁶ which effected a significant reform of the already repeatedly modified 2008 Portuguese Code of Public Contracts (PCPC).¹⁷ Prior to the 2017 reform, the modified version of Article 72 of the 2008 PCPC already included basic rules on the request of clarifications, whereby

(1) The contracting authority may ask competitors for any clarification of the submitted tenders that it deems necessary for the purpose of analysing and evaluating them.

(2) The explanations given by the respective competitors form an integral part of their tenders, provided that they do not contradict the information contained in the documents already submitted, do not alter or complete their attributes, nor aim to fill in omissions that would determine their exclusion ...¹⁸

In its post-2017 reform version, Article 72 PCPC also includes additional explicit rules on the treatment of seemingly non-compliant tenders, to the effect that

(3) The contracting authority shall ask that candidates and tenderers correct, within a maximum of five days, any irregularities in their applications or tenders

that have been caused by the breach of non-essential formalities and that need to be corrected, including the presentation of documents that only verify facts or qualities pre-existing the date for the submission of their application or tender, as long as such correction does not affect competition and equal treatment.

(4) The contracting authority shall rectify on its own the clerical or calculation errors contained in the applications or tenders, provided that the existence of the errors and the way in which they must be corrected are obvious to any observer.

(5) The requests of the contracting authority pursuant to paragraphs 1 and 3 and the corresponding responses shall be made available on an electronic platform used by the contracting authority and all applicants and tenderers shall be notified without delay.¹⁹

In my view, there are four main aspects of the post-2017 reform version of Article 72 of the PCPC that raise interesting issues, both of compatibility with EU law and for its operationalisation.²⁰ The first one concerns the interaction between the discretionary power to seek clarifications in paragraph 1 and the duty to seek clarifications in paragraph 3. The second issue results from the compatibility and potential additionality of the constraints imposed by the specific limits of paragraph 2 and the general reference to the principles of competition and equal treatment in paragraph 3. The third one regards the imposition of a duty to correct clerical and arithmetical errors

¹⁶ Decreto-Lei n.º 111-B/2017. Diário da República n.º 168/2017, 2º Suplemento, Série I de 2017-08-31. Available in Portuguese at <https://dre.pt/pesquisa/-/search/108086621/details/maximized>, last accessed 17 March 2018.

¹⁷ Código dos Contratos Públicos, aprovado pelo Decreto-Lei n.º 18/2008. Diário da República n.º 20/2008, Série I de 2008-01-29. A consolidated version as of January 2016 is available in Portuguese at http://www.base.gov.pt/mediaRep/inci/files/base_docs/CCPTextoconsolidadojan2016.pdf, last accessed 17 March 2018.

¹⁸ Own translation from Portuguese. The original text establishes that: '1 – O júri do procedimento pode pedir aos concorrentes quaisquer esclarecimentos sobre as propostas apresentadas que considere necessários para efeito da análise e da avaliação das mesmas. 2 – Os esclarecimentos prestados pelos respetivos concorrentes fazem parte integrante das mesmas, desde que não contrariem os elementos constantes dos documentos que as constituem, não alterem ou completem os respetivos atributos, nem visem suprir omissões que determinam a sua exclusão'. It is worth noting that the provision also contained a paragraph 3 that imposed transparency requirements. These are now established in paragraph 5 of the reformed Article 72 PCPC (see next footnote).

¹⁹ Own translation from Portuguese. The original text establishes that: '3 – O júri deve solicitar aos candidatos e concorrentes que, no prazo máximo de cinco dias, procedam ao suprimento das irregularidades das suas propostas e candidaturas causadas por preterição de formalidades não essenciais e que careçam de suprimento, incluindo a apresentação de documentos que se limitem a comprovar factos ou qualidades anteriores à data de apresentação da proposta ou candidatura, e desde que tal suprimento não afete a concorrência e a igualdade de tratamento. 4 – O júri procede à retificação oficiosa de erros de escrita ou de cálculo contidos nas candidaturas ou propostas, desde que seja evidente para qualquer destinatário a existência do erro e os termos em que o mesmo deve ser corrigido. Os pedidos do júri formulados nos termos dos n.os 1 e 3, bem como as respetivas respostas, devem ser disponibilizados em plataforma eletrónica utilizada pela entidade adjudicante, devendo todos os candidatos e concorrentes ser imediatamente notificados desse facto.'

A consolidated version of Art 72 PCPC is available in Portuguese at <https://dre.pt/web/guest/legislacao-consolidada/-/lc/114291580/201803171325/73494496/diploma/indice>, last accessed 17 March 2018.

²⁰ Given my limited ability to read the Portuguese language, I have not researched the existing literature to see if authors have already raised these issues. I can only present my excuses for any failure to engage with existing academic work in non-English language.

motu proprio, as well as the boundaries of such obligation and the potential effects of its unilaterality. The last one concerns the transparency given to the correction, supplementation and clarification of applications and tenders under paragraph 5.

The purpose of this paper is to critically reflect on each of these issues, using the Portuguese transposition of Article 56(3) of Directive 2014/24/EU to think more broadly about the possibilities and limits for the ‘saving’ of seemingly non-compliant tenders in an EU law compatible manner. The remainder of the paper is structured as follows: section 2 provides a condensed overview of the relevant CJEU case law. Section 3 provides a critical assessment of the post-2017 version of Article 72 of the PCPC and, in particular, assesses the extent to which there is a power or a duty to seek clarifications (3.1), explores the boundaries of the acceptable clarifications (3.2), reflects on the desirability of the unilateral correction of tenders (3.3), and raises some issues about transparency (3.4). Section 4 briefly concludes.

2. The relevant CJEU case law in a nutshell

As mentioned above, the CJEU has been actively engaged in drawing the boundaries of the exercise of discretion concerning the treatment of seemingly non-compliant tenders. Its case law has developed in the absence of explicit rules in the pre-2014 generations of EU procurement directives. Despite having entered into force in April 2016, Article 56(3) of Directive 2014/24/EU has not yet been directly interpreted by the CJEU due to its inapplicability to the underlying cases *ratione temporis*.²¹ The CJEU post-2014 case law thus continues to be framed in the context of the absence of an explicit rule in Directive 2004/18/EC.²² This case law is best understood in terms of the requirements derived from general principles of EU public procurement law and, in particular, in relation to the tension that derives from the principles of equal treatment and competition in this context. The existing case law will thus remain relevant in the application and interpretation of Article 56(3) of Directive 2014/24/EU, which explicitly requires ‘full compliance with the principles of equal treatment and transparency’, and which is in any case subjected to further compliance with the general principles of procurement in Article 18 thereof, which include the principle of competition.

The principle of equal treatment and the corollary transparency requirements establish clear constraints on what the contracting authority can accept by way of tender correction, supplementation or clarification. This results from CJEU case law that has determined that ‘the principle of equal treatment of tenderers requires that all the tenders comply with the tender conditions so as to ensure an objective comparison of the tenders submitted by the various tenderers’;²³ and that ‘[t]hat requirement would not be satisfied if tenderers were allowed to depart from the basic terms of the tender conditions [...] except where those terms expressly allow them to do so’.²⁴ Therefore,

it is also essential, in the interests of legal certainty, that the [contracting authority] be able to ascertain precisely what a tender submitted in the course of a procurement procedure means and, **in particular, to determine whether the tender complies with the conditions set out in the contract documents**. Thus, where a tender is ambiguous and the [contracting authority] is not in a position to establish, quickly and efficiently, what it actually means, that institution **has no choice but to reject the tender**.²⁵

Consequently, there may seem to be an absolute obligation to dismiss non-fully compliant tenders as a requirement or corollary of the principles of equality of treatment²⁶ and legal certainty. The acceptance or rejection of a non-fully compliant tender is thus not within the discretion of the contracting authority—which must reject all non-compliant tenders in order to guarantee equality of treatment. However, that does not mean that the contracting authority is under an *automatic* obligation to reject, nor that it cannot engage in a process of clarification of a seemingly non-compliant tender when the contracting authority is ‘in a position to establish, quickly and efficiently, what [the tender] actually means’. Such exercise can be seen not solely as a requirement of the principle of good administration,²⁷ but also of the principle of competition.²⁸

²³ Judgment of 22 June 1993, *Commission v Denmark (Storebaelt)*, C-243/89, EU:C:1993:257, paragraph 37.

²⁴ *Storebaelt*, EU:C:1993:257, paragraph 40.

²⁵ *Antwerpse Bouwwerken*, EU:T:2009:491, paragraph 58, emphasis added. See also Judgment of the Court of First Instance of 27 September 2002, *Tideland Signal v Commission*, T-211/02, EU:T:2002:232, paragraph 34.

²⁶ See P Braun, ‘Selection of Bidders and Contract Award Criteria: The Compatibility of Practice in PFI Procurement with European Law’ (2001) 10 *Public Procurement Law Review* 1, 12. Cf P Trepte, *Public Procurement in the EU: A Practitioner’s Guide*, 2nd edn (Oxford, Oxford University Press, 2007) 297.

²⁷ See above (n 10).

²⁸ The importance of this principle will only increase after its consolidation in Article 18 of Directive 2014/24/EU.

²¹ This is the case at the time of writing (17 March 2018). See eg Opinion of Advocate General Campos Sánchez-Bordona of 15 November 2017 in *MA.T.I. SUD*, C-523/16, EU:C:2017:868, paragraphs 50-55.

²² [2004] OJ L 134/114.

Indeed, it is important to stress that an exceedingly formal approach to the (automatic) rejection of non-fully compliant tenders would have negative competitive effects and could deprive the contracting authority of what would otherwise be the most economically advantageous tender. It should come as no surprise that contracting authorities might be willing to accept relatively minor deviations from the tender requirements provided that, overall, the seemingly non-compliant tender is beneficial to their interests. Interpreting the silence in Directive 2004/18/EC as imposing an automatic and non-waivable requirement to reject all non-fully compliant tenders would have unnecessarily limited the alternatives of the contracting authority and defeated the purpose of the procurement procedure by imposing the contracting of overall second-best solutions. Therefore, the CJEU case law progressively created space for pro-competitive and non-discriminatory clarification of seemingly non-compliant tenders. As recently recast, the CJEU case law establishes that *'the principle of equal treatment does not preclude the correction or amplification of details of a tender, where it is clear that they require clarification or where it is a question of the correction of obvious clerical errors, subject, however, to the fulfilment of certain requirements'*,²⁹ such as

(i) the fact that a request for clarification of a tender cannot be made until after the contracting authority has looked at all the tenders and must, as a general rule, be sent in an equivalent manner to all undertakings which are in the same situation and must relate to all sections of the tender which require clarification.³⁰

(ii) that request may not lead to the submission by a tenderer of what would appear in reality to be a new tender.³¹

See also Article 1-A of the PCPC. For in-depth discussion, see A Sanchez-Graells, *Public procurement and the EU competition rules*, 2nd edn (Oxford, Hart Publishing, 2015) ch 5. See also *ibid*, 'Some reflections on the "artificial narrowing of competition" as a check on executive discretion in public procurement' in S Bogojević, X Groussot & J Hettne (eds), *Discretion in EU Public Procurement Law*, IECL Series (Oxford, Hart Publishing, forthcoming). Available at <https://ssrn.com/abstract=3125304>, last accessed 17 March 2018.

²⁹ *Archus and Gama*, EU:C:2017:358, paragraph 29 and the case-law cited. See also *Slovensko*, EU:C:2012:191, paragraph 40, and *MA.T.I. SUD*, EU:C:2018:135, paragraph 50.

³⁰ See *Archus and Gama*, EU:C:2017:358, paragraph 30. See also *Slovensko*, EU:C:2012:191, paragraphs 42-44.

³¹ See *Archus and Gama*, EU:C:2017:358, paragraph 31, *Slovensko*, EU:C:2012:191, paragraph 40, and *MA.T.I. SUD*, EU:C:2018:135, paragraph 52.

(iii) as a general rule, when exercising its discretion as regards the right to ask a tenderer to clarify its tender, the contracting authority must treat tenderers equally and fairly, in such a way that a request for clarification does not appear unduly to have favoured or disadvantaged the tenderer or tenderers to which the request was addressed, once the procedure for selection of tenders has been completed and in the light of its outcome.³²

(iv) The CJEU also reiterated that *'a request for clarification cannot, however, make up for the lack of a document or information whose production was required by the contract documents, the contracting authority being required to comply strictly with the criteria which it has itself laid down'*.³³

(v) In addition, and specifically in relation to requests for documents, the CJEU case law also establishes that the EU rules do not preclude *'a contracting authority from asking a candidate, after the deadline for applying to take part in a tendering procedure, to provide documents describing that candidate's situation – such as a copy of its published balance sheet – which can be objectively shown to pre-date that deadline'*.³⁴

Therefore, contracting authorities are allowed to request clarifications, as long as they are scrupulous in avoiding any (perceived) instance of discrimination.³⁵ The CJEU has stressed that this is a discretionary power and not a duty of the contracting authority precisely because enabling

the contracting authority to require a tenderer whose tender it regards as imprecise or as failing to meet the ... requirements of the tender specifications to provide clarification in that regard would be to **run the risk of making the contracting authority appear to have negotiated with the tenderer on a confidential basis, in the event that that tenderer was finally successful**, to the detriment of the other tenderers and in breach of the principle of equal treatment. [...] it

³² See *Archus and Gama*, EU:C:2017:358, paragraph 32, and *Slovensko*, EU:C:2012:191, paragraph 45. One can wonder whether the *ex post* requirement in the test imposed by the CJEU is not impossible to meet (*probatio diabolica*), and whether it does not set too high a barrier for contracting authorities to effectively engage in clarification exercises.

³³ See *Archus and Gama*, EU:C:2017:358, paragraph 33, *Manova*, EU:C:2013:647, paragraph 40, and *MA.T.I. SUD*, EU:C:2018:135, paragraph 51.

³⁴ *Manova*, EU:C:2013:647, paragraph 42. Cf X Codina García-Andrade, 'Why Manova is not Slovensko: a new balance between equal treatment of tenderers and competition?' (2015) *Public Procurement Law Review* NA109.

³⁵ For critical comments, see D McGowan, 'An obligation to investigate abnormally low bids? SAG ELV Slovensko a.s. (C-599/10)' (2012) *Public Procurement Law Review* NA 165.

does not follow from ... any ... provision of Directive 2004/18, or from the principle of equal treatment or the obligation of transparency, that, in such a situation, the contracting authority is obliged to contact the tenderers concerned.³⁶

In my view, however, the argument can be even taken further and there is scope for the adoption of a '*possibilistic*' or *anti-formalistic approach*—oriented towards maintaining the maximum possible degree of competition by avoiding the rejection of offers on the basis of too formal and/or automatic rejection criteria for non-compliant offers.³⁷ It is important to underline that the relevant case law has already offered some guidance that points in this direction by stressing that '*the guarantees conferred by the [Union] legal order in administrative proceedings include, in particular, the principle of good administration, involving the duty of the competent institution to examine **carefully and impartially** all the relevant aspects of the individual case*'³⁸—which, in the case of public procurement, should be interpreted as requiring contracting authorities to exercise *due care* in the evaluation of the tenders submitted by tenderers,³⁹ and possibly creating a positive duty to seek or carry out corrections of errors.⁴⁰ To be sure, the obligation of contracting authorities to review the tenders for possible mistakes and to contact tenderers to seek for *correction* or *supplementation* is limited as a mandate of the principle of non-discrimination; but the scope for *clarification* of the tenders and for the establishment of rules allowing for a flexible treatment of formally non-compliant tenders, support the adoption of this possibilistic approach in the evaluation of tenders (as a specification of the duty of due care or diligent administration required of contracting authorities).

In this regard, as reasoned by the EU case law, the contracting authority is under an obligation to conduct the revision of the tenders in accordance with the principle of good administration (Art 41 CFREU)⁴¹ and is, consequently, under an obligation to

exercise the power to ask for additional information in circumstances where the clarification of a tender is clearly both practically possible and necessary, and as long as the exercise of that duty to seek clarification is in accordance with the principle of equal treatment.⁴² This means that the contracting authority is to adopt an anti-formalistic approach that renders the effective appraisal of the tenders possible—regardless of minor deficiencies, ambiguities or apparent mistakes. Indeed, as stressed by the jurisprudence, in cases where the terms of a tender themselves and the surrounding circumstances known to the authority indicate that the ambiguity probably has a simple explanation and can be easily resolved, then, in principle, it is contrary to the requirements of good administration to reject the tender without exercising its power to seek clarification. A decision to reject a tender in such circumstances is, consequently, liable to be vitiated by a manifest error of assessment on the part of the contracting authority,⁴³ and could result in an unnecessary restriction of competition.

Therefore, contracting authorities should ensure that the evaluation of tenders leading to the award of the contract is based on the substance of the tenders—by adopting a possibilistic or anti-formalist approach that excludes purely formal decisions that restrict competition unnecessarily; subject, always, to guaranteeing compliance with the principle of equal treatment. Nonetheless, it is important to stress that the duty of good administration does not go so far as to require the contracting authority to seek clarification *in every case* where a tender is ambiguously drafted.⁴⁴ Particularly as regards calculations and other possible non-obvious clerical mistakes, the duty of good administration is considerably more restricted and the authority's diligence only requires that clarification be sought in the face of *obvious* errors that should have been detected when assessing the tender.⁴⁵ This

³⁶ *Slovensko*, EU:C:2012:191, paragraphs 37-38, emphasis added.

³⁷ As mentioned, this will more clearly be the case under Art 56(3) in combination with Art 18(1) of Directive 2014/24/EU; Sanchez-Graells, *Public procurement and competition rules* (n 28) 321-323.

³⁸ Judgment of the Court of First Instance of 14 February 2006, *TEA-CEGOS and Others v Commission*, T-376/05, EU:T:2006:47, paragraph 76, emphasis added.

³⁹ *TEA-CEGOS*, EU:T:2006:47, paragraph 83.

⁴⁰ Along the same lines, Arrowsmith (n 2) 821-824.

⁴¹ Article 41 of the Charter of Fundamental Rights of the European Union (OJ 2007 C 303/1). On this general principle of EU administrative law, see T Fortsakis, 'Principles Governing Good Administration' (2005) 11 *European Public Law* 207. Of particular relevance here is

one of the manifestations of the general principle of good administration, ie the principle of proper functioning of the administration—which implies that '*administrations are required to carry out their activities not only in accordance with the relevant legal rules but also in a professional manner and in keeping with the facts of common experience*' (ibid at 209). See also HP Nehl, *Principles of Administrative Procedure in EC Law* (Oxford, Hart Publishing, 1999) 101-165; and J Mendes, 'Good Administration in EU Law and the European Code of Good Administrative Behaviour', *EUI Working Paper Law 2009/09*, available at <http://hdl.handle.net/1814/12101>, last visited 17 March 2018.

⁴² See *Tideland Signal*, EU:T:2002:232, paragraphs 37-38, and cited case law. See also *Antwerpse Bouwwerken*, EU:T:2009:491.

⁴³ *Tideland Signal*, EU:T:2002:232, paragraphs 37-38, and cited case law.

⁴⁴ *Tideland Signal*, EU:T:2002:232, paragraph 37 *ab initio*.

⁴⁵ See *Belfass*, EU:T:2008:160, paragraphs 65-71.

is so particularly because, as clearly indicated by the CJEU, the presence of non-obvious errors and their subsequent amendment or correction might result in breaches of the principle of equal treatment.⁴⁶

On the whole, then, the CJEU case law has established the boundaries for the exercise of a not entirely discretionary power to seek clarification, supplementation and correction of seemingly non-compliant tenders that has as its main focus the prevention of discrimination between tenderers. Provided that discrimination is not at risk or is excluded through adequate procedural mechanisms, contracting authorities willing to 'save' non-compliant tenders can adopt a possibilistic approach aimed at ensuring that the assessment of tenders and the award of the contract preserves the benefits of competition by adopting a functional rather than a formal approach to this issue.

3. Critical assessment of the post-2017 version of Article 72 of the PCPC

Against the backdrop of the condensed overview of the existing CJEU case law in the previous section, the paper now concentrates on the critical assessment of the post-2017 version of Article 72 of the PCPC and, in particular, on four main issues concerning: the existence of a mere discretionary power or a positive duty to seek clarifications, corrections or supplementations of tenders and their accompanying documentation (3.1); the constraints imposed on such power or duty (3.2); the desirability of unilateral tender corrections by the contracting authority (3.3); and the transparency of the correction, supplementation or clarification of tenders (3.4).

3.1 Power or duty to seek clarifications?

As mentioned in section 2 above, the case law of the CJEU falls short from creating a general duty to seek clarifications under any circumstances.⁴⁷ As a matter of EU law, contracting authorities are not obliged to seek clarifications or demand explanations where the errors or shortcomings are not *obvious* (first prong),⁴⁸ but can be constrained by a duty to seek clarifications or implement corrections where

the terms of a tender themselves and the surrounding circumstances known to the authority indicate that the ambiguity probably has a simple explanation and can be easily resolved (second prong).⁴⁹ The first prong of this doctrine (ie no general obligation) seems largely compatible with Article 56(3) of Directive 2014/24/EU, inasmuch as it is formulated in enabling terms: '*contracting authorities may ... request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation*'. However, it is worth bearing in mind that Member States can decide to preclude this possibility in their domestic transposition, which raises the question whether this would be compatible with the second prong of the doctrine.

Turning to Article 72(1) and (3) of the PCPC in its post-2017 formulation, it seems that the Portuguese transposition is in line with Article 56(3) of Directive 2014/24/EU and with the broader CJEU case law. Firstly, Article 72(1) PCPC maintains the enabling approach of Article 56(3) and the first prong of the CJEU case law by establishing that a '*contracting authority may ask competitors for any clarification of the submitted tenders that it deems necessary for the purpose of analysing and evaluating them*'. A question can be raised here, however, on whether the enabling clause in Article 72(1) PCPC is too broad by referring to the possibility to ask for '*any clarification deemed necessary*', whereas Article 56(3) of Directive 2014/24/EU refers to the possibility to seek clarification of '*relevant information or documentation*' and the case law requires that the need for the clarification is *clear*.⁵⁰ However, beyond linguistic differences, it seems that both clauses will be subject to a general requirement of proportionality, which will modulate the exercise of this power by contracting authorities.

Secondly, despite its more prescriptive content, Article 72(3) also seems in line with Article 56(3) of Directive 2014/24/EU, with maybe only an open query regarding whether five days is to be considered '*an appropriate time limit*'. Given the limited space for the correction, supplementation or clarification of tenders, there is no strong indication to the contrary. In addition to that, Article 72(3) ensures compliance with the second prong of the case law by imposing on the contracting authority the obligation to ask candidates and tenderers for a correction or supplementation of '*any irregularities in their applications or tenders that have been caused by the breach of non-essential formalities and that need to be corrected... as long as such correction does not affect competition and equal treatment*'. A question

⁴⁶ Judgment of the Court of First Instance of 8 May 1996, *Adia interim v Commission*, T-19/95, EU:T:1996:59, paragraphs 43-49. Similarly, Judgment of the Court of First Instance of 26 February 2002, *Esedra v Commission*, T-169/00, EU:T:2002:40, paragraph 49; and Judgment of the Court of First Instance of 18 April 2007, *Deloitte Business Advisory v Commission*, T-195/05, EU:T:2007:107, paragraph 102.

⁴⁷ *Slovensko*, EU:C:2012:191, paragraphs 37-38.

⁴⁸ See above (nn 45 & 46).

⁴⁹ *Tideland Signal*, EU:T:2002:232, paragraphs 37-38.

⁵⁰ *Archus and Gama*, EU:C:2017:358, paragraph 29.

arises here, however, as to whether the domestic rule goes beyond the second prong of the CJEU case law.

As mentioned above (section 2), under EU law, a positive obligation to seek clarification or correction arises only where the shortcoming is *obvious*. Conversely, the presence of non-obvious errors and their subsequent amendment or correction might result in breaches of the principle of equal treatment.⁵¹ Therefore, it seems that the only EU law consistent interpretation of Article 72(3) PCPC is that the *obligation* to seek correction or supplementation of the applications and tenders only arises where the shortcomings are obvious—which may somehow be captured by the requirement that the shortcomings not only result from the breach of non-essential formalities, but also that they require correction (*ie* ‘need to be corrected’). This is important because, otherwise, a contracting authority could be tempted to seek correction or supplementation of non-obvious errors and, provided it sought clarification from all candidates or tenderers in a non-discriminatory fashion (in procedural terms), it could be seen as not (formally) infringing the domestic Portuguese rule in Article 72(3) PCPC. Moreover, a systematic interpretation of Article 72(3) and (4) could lead to a purely domestic construction of the first provision that excluded the requirement for obviousness of the error or shortcoming under Article 72(3) because, that being an explicit requirement of Article 72(4) PCPC (see below 3.3), it could be argued that the Portuguese legislator could have also included it in the previous paragraph if it so wished—its absence thus justifying an interpretation not requiring obviousness. However, these arguments would fail to ensure compliance with the obligation of consistent interpretation with EU law.⁵² In my view, the obligation to demand clarifications under Article 72(3) can only be triggered by the existence of an obvious error—which will naturally restrict its scope of application relative to the possibility for the contracting authority

to seek clarifications under Article 72(1)—and this may be relevant in terms of preserving some space for executive discretion—although all types of clarifications (*ie* whether discretionary or mandatory) may well end up being constrained by the same sets of limitations, as discussed immediately below.

3.2 Boundaries of acceptable clarifications

Beyond the main difference between Article 72(1) and (3) in terms of the enforceability against the contracting authority of a duty to seek clarification (Art 72(3)) or the empowerment of the contracting to seek such clarification where necessary (Art 72(1)); a literal reading of Article 72(2) and (3) may lead to the understanding that the exercise of the power/duty are subjected to different limitations. Indeed, Article 72(2) comes to limit the discretionary exercise of the power to seek clarifications from an *ex post* perspective—*ie* it does not bar the exercise of the power, but rather prevents the contracting authority from taking into account the clarifications, supplements or corrections obtained—where the explanations given by the respective competitors (i) contradict the information contained in the documents already submitted, (ii) alter or complete their attributes, or (iii) fill in omissions that would have determined the exclusion of the tenderer (as applicant) or its tender. On its part, Article 72(3) *in fine* excludes the mandatory correction or supplementation of tenders where doing so would ‘*affect competition and equal treatment*’. It is not clear whether this reflects an *ex ante* or an *ex post* approach. Moreover, Article 72(3) also embeds a more precise limitation, which forbids the acceptance of supplementary documentation except if it verifies ‘*facts or qualities pre-existing the date for the submission of their application or tender*’. In my view, there are two issues that require careful analysis. First, whether the requirements of Article 72(2) and (3) are in line with CJEU case law. Second, whether they are mutually exclusive or cumulative, or whether they are simple conduits for the application of CJEU case law in Portugal.

On the first issue, I submit that while the constraints included in Article 72(2) are in line with CJEU case law, they are also insufficient to encapsulate the entirety of applicable constraints. Indeed, Article 72(2) PCPC only refers to the impossibility to formulate a new tender (*ie* contradict the terms of the previous tender, or alter or complete its attributes) or to provide documents which absence was subject to exclusion / rejection in the tender documentation. This is in line with the constraints identified as (ii) and (iv) in section 2 (above), and thus fails to cover the additional requirements that: a request for clarification cannot be made until after the contracting authority has looked at all the tenders and must, as a general rule,

⁵¹ See above (n 46).

⁵² See the seminal Judgments of 10 April 1984, *Von Colson and Kamann v Land Nordrhein-Westfalen*, C-14/83, EU:C:1984:153; and *Harz v Deutsche Tradax*, C-79/83, EU:C:1984:155. The principle was crystallised in the Judgment of 13 November 1990, *Marleasing v Comercial Internacional de Alimentación*, C-106/89, EU:C:1990:395; and the Judgment of 16 December 1993, *Wagner Miret v Fondo de garantía salarial*, C-334/92, EU:C:1993:945. Specifically in the field of public procurement, see Judgment of 22 June 1989, *Fratelli Costanzo v Comune di Milano*, C-103/88, EU:C:1989:256, paragraphs 28-33; and, more recently, Judgment of 18 December 2007, *Frigerio Luigi & C.*, C-357/06, EU:C:2007:818, paragraphs 28-29; and Judgment of 15 May 2008, *SECAP and Santorso*, C-147/06, EU:C:2008:277, paragraph 22.

be sent in an equivalent manner to all undertakings which are in the same situation and must relate to all sections of the tender which require clarification (constraint (i)); as a general rule, the contracting authority must treat tenderers equally and fairly, in such a way that a request for clarification does not appear unduly to have favoured or disadvantaged the tenderer or tenderers to which the request was addressed, once the procedure for selection of tenders has been completed and in the light of its outcome (constraint (iii)); and, specifically in relation to documents, the additional constraint that a request *'to provide documents describing that candidate's situation – such as a copy of its published balance sheet – [can only cover those] which can be objectively shown to pre-date that deadline'* (constraint (v)).

Still on this first issue, I submit that Article 72(3) PCPC also diverges from the CJEU case law in relation to constraint (v) requiring that additional documents *'objectively pre-date the deadline for applying to take part in a tendering procedure'*. Indeed, taken literally, Article 72(3) disregards this constraint by swapping the focus of analysis of pre-existence from the date of creation of the document (as required by the CJEU case law) to the date of existence of the facts or circumstances reflected in the documents. On a flexible interpretation, Article 72(3) PCPC could seem to allow for the elaboration of the explanatory or additional documents after the expiry of the relevant deadline (*ie* expression of interest or submission of the tender, as applicable)—which, in my view, would run contrary to the CJEU case law. The remainder of Article 72(3) is not inconsistent with CJEU case law, and the reference to respect of competition and equal treatment must, in my view, be interpreted as a reference to that case law—both present and future. This leads to the analysis of the second issue.

As mentioned above, it is worth reflecting on whether Article 72(2) and (3) PCPC (the latter in part) are mutually exclusive or cumulative, or whether they are simple conduits for the application of CJEU case law in Portugal. I would submit that both provisions are affected by the duty of contracting authorities, review bodies and courts to interpret domestic law consistently with EU law. Therefore, both provisions cannot be seen as more than an anchor for the application of the CJEU case law discussed above (section 2) and, in the end, both provisions require compliance with the entirety of the constraints resulting therein (*ie* not only current constraints (i) to (v), but also any additional constraints derived from future case law).

3.3 Unilateral correction of tenders

Differently from the previous discussion, and generally in line with the second prong of CJEU case

law requiring contracting authorities to discharge a positive duty to seek correction of *obvious* errors (above section 2),⁵³ Article 72(4) PCPC imposes an obligation on every contracting authority to *'rectify on its own the clerical or calculation errors contained in the applications or tenders, provided that the existence of the errors and the way in which they must be corrected are obvious to any observer'*. The difficulty with this provision is not so much its compatibility with EU law, but rather its operationalisation. It is not clear that the contracting authority should be granted a power to unilaterally correct the content of the tenders it received, even if the way in which the correction should operate is obvious. This is so for two reasons, first, the open-ended standard created for the correction to be *'obvious to anyone'* could generate one of two effects: (i) either a very limited application of the provision by cautious contracting authorities, or (ii) a very expansive limitation by risk-taking contracting authorities. This could trigger issues in two dimensions. First, in relation to the *'corrected'* tenderer. Second, in relation with other tenderers and, possibly, third parties. The second dimension will be discussed in relation to transparency requirements (below, section 3.4).

In relation to the correction or not of obviously erroneous tenders and its impact on the relationship between the contracting authority and the *'corrected'* tenderer, I can think of two problematic issues. Firstly, it could well happen that what a contracting authority considers an obvious correction is not at all obvious, or acceptable, to the tenderer. In that case, the power of unilateral variation implicit in the duty to correct could result in the tenderer not being willing or able to deliver the contract in the *'corrected'* terms. Secondly, the opposite could be true, and what would be an obvious correction in the eyes of the tenderer may not be equally clear to the contracting authority. In this case, the fact that Article 72(4) does not explicitly foresee a mechanism whereby the tenderer can prompt the contracting authority to undertake the *'obvious'* correction may also lead to litigation. Of course, both of these issues may or not be a problem depending on the existence of other rules in the PCPC or general Portuguese administrative law that discipline the behaviour of the contracting authority. However, following the logic in an emerging line of CJEU case law opposed to the reliance on general rules where that option is not self-evident to (foreign) tenderers,⁵⁴ I would think that these are issues worth reconsidering or possibly clarifying. In my view, even if less immediate than a duty/power of unilateral

⁵³ See (n 43) and accompanying text.

⁵⁴ By analogy, see Judgment of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404.

correction of tenders, a contradictory phase in the evaluation procedure would be preferable, to the effect that the contracting authority that intended to implement an 'obvious' correction would be obliged to communicate this situation to the relevant tenderer and allow it sufficient time (maybe five days, for consistency with Article 72(3)) to clarify whether it shared or not the contracting authority's view.⁵⁵ In the absence of agreement, arguably, the contracting authority should be barred from implementing the correction—due to the lack of 'obviousness' of the required changes—but it would be equally empowered (and arguably obliged) to reject the tender as effectively non-compliant.

3.4 Transparency issues

The final aspect of Article 72 PCPC that deserves comment concerns its last paragraph, which requires that requests for clarifications and relevant answers are '*made available on an electronic platform used by the contracting authority and all applicants and tenderers shall be notified without delay*'. From a perspective of full transparency, the scope of this provision seems insufficient because it only applies to clarifications, supplementations or corrections under paras 1 and 3 of Article 72. There is no clear rationale for the exclusion of corrections under Article 72(4) PCPC from this transparency mechanism, and this can create some problems and challenges if competing tenderers or even third parties take a different view on the obviousness of the unilateral correction. One of the arguments given by the CJEU not to impose a duty to seek clarifications is that there is a '*risk of making the contracting authority appear to have negotiated with the tenderer on a confidential basis, in the event that that tenderer was finally successful*'.⁵⁶ By excluding this type of correction from the *ad hoc* transparency requirement of Article 72(5) PCPC, this risk may be exacerbated. Conversely, and from the perspective of potential excesses in the transparency of procurement procedures,⁵⁷ the entire provision

may trigger criticism—unless it is not interpreted broadly and as requiring an automatic and unavoidable disclosure of the specific clarifications, supplementations or correction—as this could lead to perverse effects on competition in the relevant market. However, an analysis of this issue exceeds the possibilities of this paper and is better saved for some other occasion.

4. Conclusion

This paper has shown how, despite the sparsity of Article 56(3) of Directive 2014/24/EU, in its transposition, Member States must respect a much more detailed set of constraints that derive from the CJEU case law on clarification and correction of tenders for public contracts. Using the example of Article 72 of the Portuguese Code of Public Contracts after its 2017 reform linked to the transposition of the EU 2014 Public Procurement Package, the paper has reflected on the impact of the CJEU case law on the discretion left to Member States to create their own set of rules in this area. In particular, the paper has raised potential problems in the configuration of powers and duties to seek clarification or correction, as well as the applicable limits thereon, issues concerning the unilaterality of corrections and the transparency given to corrections, supplementations and clarifications of tenders for public contracts. Hopefully, the analysis in the paper will not only be useful to academics and practitioners in Portugal, but also to those interested in comparative analysis of EU procurement law.

⁵⁵ Also by analogy, see the proposals in A Sanchez-Graells, '“If it ain't broke, don't fix it”? EU requirements of administrative oversight and judicial protection for public contracts', in S Torricelli & F Folliot Lalliot (eds), *Oversight and Challenges of Public Contracts* (Brussels, Bruylant, 2018) 495-534.

⁵⁶ See above (n 36).

⁵⁷ See KM Halonen, 'Disclosure Rules in EU Public Procurement: Balancing between Competition and Transparency' (2016) 16(4) *Journal of Public Procurement* 528. See also A Sanchez-Graells, 'The Difficult Balance between Transparency and Competition in Public Procurement: Some Recent Trends in the Case Law of the European Courts and a Look at the New Directives' (2013) University of Leicester School of Law Research Paper No. 13-11, available at <https://ssrn.com/abstract=2353005>, last accessed 17 March 2018.